

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-4028, 78-4047

B

P/S

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC. and  
RCA GLOBAL COMMUNICATIONS, INC.,

*Petitioners,*

—against—

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

*Respondents,*

and

GRAPHNET SYSTEMS, INC.,  
TELENET COMMUNICATIONS CORPORATION,  
WESTERN UNION INTERNATIONAL, INC., and  
TRT TELECOMMUNICATIONS CORPORATION,

*Intervenors.*

ON PETITION FOR REVIEW OF MEMORANDUM OPINIONS, ORDERS,  
AUTHORIZATIONS AND CERTIFICATES OF THE  
FEDERAL COMMUNICATIONS COMMISSION

**BRIEF OF PETITIONER  
RCA GLOBAL COMMUNICATIONS, INC.**

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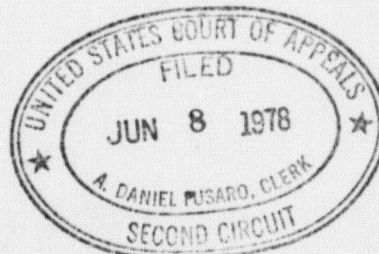
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## TABLE OF CONTENTS

|                                                                                                                                                                                                    | <u>Page</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Issues Presented for Review.....                                                                                                                                                                   | 5           |
| Statutes Involved.....                                                                                                                                                                             | 6           |
| Statement of the Case.....                                                                                                                                                                         | 7           |
| A. Nature of the Decision under Review.....                                                                                                                                                        | 7           |
| B. Industry Affected by Decision.....                                                                                                                                                              | 10          |
| C. The Emerging Transmission Technologies....                                                                                                                                                      | 19          |
| D. The Section 214 Application at Issue.....                                                                                                                                                       | 26          |
| 1. The Authorizations Requested.....                                                                                                                                                               | 26          |
| 2. The IRCs' Opposition to Graphnet<br>and Telenet.....                                                                                                                                            | 29          |
| 3. The Commission's Ruling.....                                                                                                                                                                    | 33          |
| E. Developments Pending Reconsideration.....                                                                                                                                                       | 35          |
| <br>POINT I -                                                                                                                                                                                      |             |
| THE COMMISSION'S CLAIM THAT ITS<br>ADMISSION OF DOMESTIC CARRIERS<br>TO THE OVERSEAS SERVICE WILL<br>MEET AN UNMET PUBLIC NEED IS,<br>ON THIS RECORD, ARBITRARY AND<br>CAPRICIOUS.....             | 38          |
| <br>POINT II -                                                                                                                                                                                     |             |
| THE COMMISSION ALSO HAS FAILED<br>TO PROVIDE A REASONED ANALYSIS<br>OF THE COMPETITIVE EFFECTS UPON<br>THE IRCs, AND THEIR SERVICE TO<br>THE PUBLIC, OF THE GRANTS TO<br>GRAPHNET AND TELENET..... | 44          |
| CONCLUSION.....                                                                                                                                                                                    | 51          |



# TABLE OF AUTHORITIES

| <u>Cases</u>                                                                                                                                          | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>Bowman Transportation, Inc. v.</u><br><u>Arkansas-Best Freight Systems, Inc.,</u><br>419 U.S. 281 (1974).....                                      | 45          |
| <u>British Airways Board v. Port Authority,</u><br>564 F.2d 1002 (2d Cir. 1977).....                                                                  | 25n         |
| <u>City of Chicago v. FPC,</u><br>458 F.2d 731 (D.C. Cir. 1971), <u>cert.</u><br><u>denied</u> , 405 U.S. 1074 (1972).....                            | 45n         |
| <u>FCC v. RCA Communications, Inc.,</u><br>346 U.S. 86 (1953).....                                                                                    | 45n         |
| <u>FTC v. Crowther,</u><br>430 F.2d 510 (D.C. Cir. 1970).....                                                                                         | 44          |
| <u>Friends of the Earth v. FCC,</u><br>449 F.2d 1164 (D.C. Cir. 1971).....                                                                            | 44          |
| <u>Garrett v. FCC,</u><br>513 F.2d 1056 (D.C. Cir. 1975).....                                                                                         | 44          |
| <u>Hawaiian Tel. Co. v. FCC,</u><br>498 F.2d 771 (D.C. Cir. 1974).....                                                                                | 45n         |
| <u>Marco Sales Co. v. FTC,</u><br>453 F.2d 1 (2d Cir. 1971).....                                                                                      | 44          |
| <u>Mary Carter Paint Co. v. FTC,</u><br>333 F.2d 654 (5th Cir. 1964),<br><u>rev'd on other grounds</u> , 382 U.S. 46 (1965).....                      | 43          |
| <u>Office of Communication of United</u><br><u>Church of Christ v. FCC,</u><br>560 F.2d 529 (2d Cir. 1977).....                                       | 43-44       |
| <u>RCA Global Communications, Inc. v. FCC,</u><br>559 F.2d 881 (2d Cir.), <u>modified on</u><br><u>other grounds</u> , 563 F.2d 1 (2d Cir. 1977)..... | 45n         |
| <u>Rayonier Inc. v. NLRB,</u><br>380 F.2d 187 (5th Cir. 1967).....                                                                                    | 44          |



|                                                                                                                                                                 | <u>Page</u>    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <u>Secretary of Agriculture v. United States,</u><br>347 U.S. 645 (1954).....                                                                                   | 44             |
| <u>Western Union International, Inc. v. FCC,</u><br>544 F.2d 87 (2d Cir. 1976), <u>cert. denied</u> ,<br>98 S.Ct. 299 (1977).....                               | 12             |
| <u>Western Union Tel. Co. v. United States,</u><br>267 F.2d 715 (2d Cir. 1959).....                                                                             | 11n            |
| <br><u>Administrative Decisions</u><br>                                                                                                                         |                |
| <u>All American Cables and Radio, Inc.,</u><br>15 F.C.C. 293 (1950).....                                                                                        | 16             |
| <u>American Tel. &amp; Tel. Co.,</u><br>37 F.C.C. 1151 (1964).....                                                                                              | 14             |
| <u>American Tel. &amp; Tel. Co.,</u><br>35 F.C.C.2d 801 (1972), <u>amended</u> ,<br>39 F.C.C.2d 865, <u>amended</u> ,<br>40 F.C.C.2d 913 (1973).....            | 12n            |
| <u>Application for Merger of</u><br><u>Western Union Tel. Co.,</u><br>10 F.C.C. 148 (1943).....                                                                 | 11             |
| <u>Commercial Cable Co.,</u><br>28 F.C.C. 283 (1960).....                                                                                                       | 32n            |
| <u>Customer Use of Telex Service,</u><br>62 F.C.C. 2d 414 (1976).....                                                                                           | 31n            |
| <u>Domestic Communications-Satellite Facilities</u><br><u>(Proposed Second Report and Order),</u><br>34 F.C.C. 2d 9 (Chief, Common Carrier<br>Bureau 1972)..... | 13             |
| <u>Domestic Communications-Satellite Facilities</u><br><u>(Second Report and Order),</u><br>35 F.C.C.2d 844 (1972).....                                         | 13, 15n<br>16n |
| <u>Graphnet Systems, Inc.,</u><br>44 F.C.C. 2d 800 (1974).....                                                                                                  | 19, 20n        |
| <u>ITT Domestic Transmission Systems, Inc.,</u><br>62 F.C.C. 2d 236 (1976).....                                                                                 | 18             |



|                                                                                                                                                                           | <u>Page</u>               |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|
| <u>International Record Carriers'</u><br><u>Scope of Operations,</u><br>38 F.C.C. 2d 543 (1972).....                                                                      | 11n, 17n                  |
| <u>International Record Carriers'</u><br><u>Scope of Operations,</u><br>40 F.C.C. 2d 1082 (1973).....                                                                     | 16, 39                    |
| <u>International Record Carriers'</u><br><u>Scope of Operations,</u><br>54 F.C.C. 2d 532 (1975).....                                                                      | 11n, 17                   |
| <u>International Record Carriers'</u><br><u>Scope of Operations,</u><br>54 F.C.C. 2d 909 (1975).....                                                                      | 10n, 16-17,<br>17n, 38-39 |
| <u>International Record Carriers'</u><br><u>Scope of Operations,</u><br>58 F.C.C. 2d 250 (1976).....                                                                      | 11n, 17,<br>30n           |
| <u>Microwave Communications, Inc.,</u><br>18 F.C.C. 2d 953 (1969).....                                                                                                    | 15n                       |
| <u>New England Tel. &amp; Tel. Co.,</u><br>17 F.C.C. 2d 33 (1969).....                                                                                                    | 32n                       |
| <u>Overseas Communications,</u><br>30 F.C.C. 2d 571 (1971).....                                                                                                           | 12n                       |
| <u>Overseas Dataphone Service,</u><br>57 F.C.C. 2d 705 (1976), <u>aff'd sub nom.</u><br><u>ITT World Communications Inc. v. FCC,</u><br>555 F.2d 1125 (2d Cir. 1977)..... | 23n, 24n                  |
| <u>Packet Communications, Inc.,</u><br>43 F.C.C. 2d 922 (1973).....                                                                                                       | 15n, 24                   |
| <u>RCA Global Communications, Inc.,</u><br>42 F.C.C. 2d 774 (1973), <u>aff'd sub nom.</u><br><u>Network Project v. FCC,</u><br>511 F.2d 786 (D.C. Cir. 1975).....         | 13                        |
| <u>RCA Global Communications, Inc.,</u><br>56 F.C.C. 2d 660 (1975).....                                                                                                   | 13n, 18                   |
| <u>RCA Globcom Systems, Inc.,</u><br>F.C.C. File No. W-P-C 1396 (Apr. 18, 1978).....                                                                                      | 18                        |



|                                                                                                                                                                                                                                                                                                                                                                                                                    |                     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| <u>Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities</u> , 60 F.C.C. 2d 261 (1976), <u>modified on reconsideration</u> , 62 F.C.C. 2d 588 (1977), <u>aff'd sub nom. American Tel. &amp; Tel. Co. v. FCC</u> , 572 F.2d 17 (2d Cir. 1978), <u>cert. applied for sub nom. International Business Machines Corp. v. FCC</u> , 46 U.S.L.W. 3694 (U.S. Apr. 26, 1978)..... | 15n-16n,<br>24, 24n |
| <u>STA for TV Service via Satellite</u> ,<br>1 F.C.C. 2d 82, <u>amended</u> ,<br>1 F.C.C. 2d 415 (1965), <u>modified</u> ,<br>18 F.C.C. 2d 402 (1969), <u>modified</u> ,<br>20 F.C.C. 2d 965 (1970).....                                                                                                                                                                                                           | 14                  |
| <u>Separate Report on International Formula</u> ,<br>10 F.C.C. 184 (1943).....                                                                                                                                                                                                                                                                                                                                     | 11n                 |
| <u>Specialized Common Carrier Services</u> ,<br>24 F.C.C. 2d 318 (1970), 29 F.C.C. 2d 870, <u>reconsideration denied</u> ,<br>31 F.C.C. 2d 1106 (1971), <u>aff'd sub nom. Washington U. &amp; T. Commission v. FCC</u> , 513 F.2d 1142 (9th Cir.), <u>cert. denied</u> ,<br>423 U.S. 836 (1975).....                                                                                                               | 15n, 46n            |
| <u>Telenet Communications Corp.</u> ,<br>46 F.C.C. 2d 680 (1974).....                                                                                                                                                                                                                                                                                                                                              | 19, 20n             |
| <u>Telenet Communications Corp.</u><br>/Hawaiian Tel. Co.,<br>File No. I-T-C 2676 (Dec. 15, 1977).....                                                                                                                                                                                                                                                                                                             | 27n, 38             |
| <u>Tymnet, Inc.</u> ,<br>65 F.C.C. 2d 247 (1976).....                                                                                                                                                                                                                                                                                                                                                              | 24                  |
| <u>United States Transmission Systems, Inc.</u> ,<br>48 F.C.C. 2d 859 (1974), <u>reconsideration denied</u> ,<br>51 F.C.C. 2d 207 (1975), <u>aff'd sub nom. American Tel. &amp; Tel. Co. v. FCC</u> ,<br>539 F.2d 767 (D.C. Cir. 1976).....                                                                                                                                                                        | 18, 24<br>39        |
| <u>Western Union Divestment</u> ,<br>30 F.C.C. 323 (1961).....                                                                                                                                                                                                                                                                                                                                                     | 11n                 |
| <u>Western Union Tel. Co.</u> ,<br>29 F.C.C. 2d 422 (1971).....                                                                                                                                                                                                                                                                                                                                                    | 16n                 |



## International Agreements

|                                                                                                                                          | <u>Page</u> |
|------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Agreement Establishing Interim<br>Arrangements for a Global Commercial<br>Communications Satellite System,<br>15 U.S.T. 1705 (1964)..... | 12n         |
| Agreement Relating to the International<br>Telecommunications Satellite Organization<br>"Intelsat",<br>23 U.S.T. 3813 (1973).....        | 12n         |
| International Telecommunications Convention<br>(Malaga-Torrelmolinas),<br>U.S.T.<br>T.I.A.S. No. 8572 (1973).....                        | 26n         |

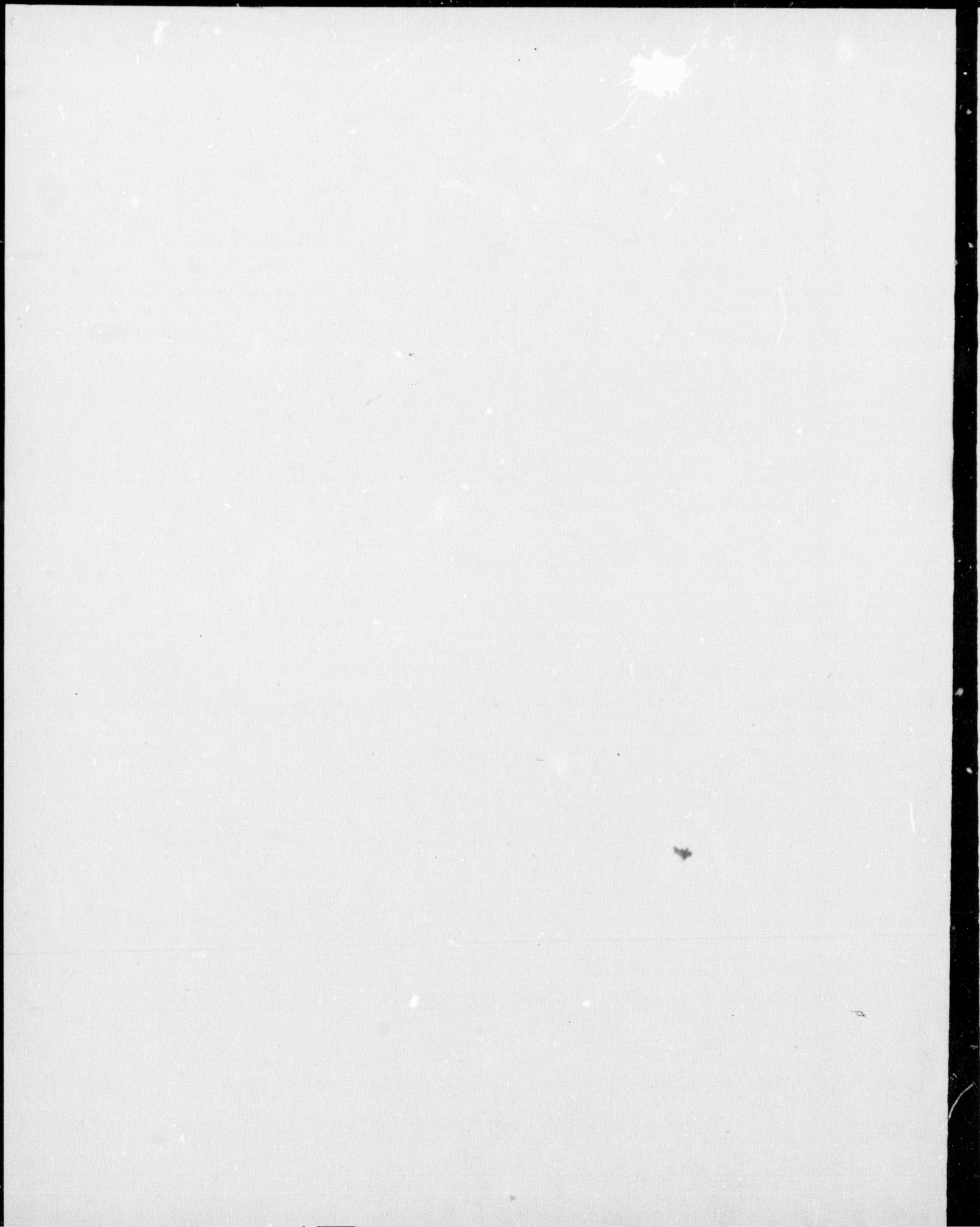
## Statutes

|                                                                                            |                                  |
|--------------------------------------------------------------------------------------------|----------------------------------|
| Administrative Procedure Act,<br>5 U.S.C. § 706(2)(a) (1976).....                          | 39                               |
| Communications Act of 1934,<br>§§ 1-609, 47 U.S.C. §§ 151-609<br>(1970 & Supp.V 1975)..... | 6                                |
| § 201, 47 U.S.C. § 201 (1970).....                                                         | 9                                |
| § 211, 47 U.S.C. § 211 (1970).....                                                         | 12n                              |
| § 214, 47 U.S.C. § 214 (1970 & Supp.V 1975).....                                           | 2, 4, 6,<br>9, 26, 30,<br>35, 51 |
| § 222, 47 U.S.C. § 222 (1970 & Supp.V 1975).....                                           | 10, 11, 11n,<br>12, 16n          |

Miscellaneous

|                                                                                                                                           | <u>Page</u>     |
|-------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| Federal Communications Commission,<br><u>Statistics of Communications Common Carriers:</u><br><u>Year Ended Dec. 31, 1976 (1977).....</u> | 33n, 47,<br>50n |
| Federal Communications Commission,<br>Regulation, 47 C.F.R. § 43.61(a)(6)(1976).....                                                      | 14n             |
| Martin, <u>Future Developments in</u><br><u>Telecommunications (1977).....</u>                                                            | 22n             |





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ITT WORLD COMMUNICATIONS INC. and  
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

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GRAPHNET SYSTEMS, INC., TELENET  
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WESTERN UNION INTERNATIONAL, INC.,  
and TRT TELECOMMUNICATIONS  
CORPORATION,

Intervenors.

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BRIEF OF PETITIONER  
RCA GLOBAL COMMUNICATIONS, INC.

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Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom"), a common carrier of international record (i.e., non-voice) communications, including telegrams, telex, data and facsimile traffic, and of private-line channels for voice/data communications between the continental United



States and overseas points around the world, submits this brief in support of a Petition to Review which asks the Court to vacate and set aside, in part, two related Orders of the Respondent FEDERAL COMMUNICATIONS COMMISSION ("FCC" or "the Commission").

They are a Memorandum Opinion, Order, Authorization and Certificate ("the Decision") which the Commission released on January 11, 1977, FCC 77-2, 63 F.C.C.2d 402 (1977) (JA 1),\* and a further Memorandum Opinion and Order ("the Reconsideration Order") released April 3, 1978, FCC 78-181, \_\_\_ F.C.C.2d \_\_\_ (1978) (JA 20), which denied RCA Globcom's Petition for Partial Reconsideration of the Decision.

RCA Globcom challenges the Decision and Reconsideration Order insofar as they grant to two domestic carriers, Intervenor GRAPHNET SYSTEMS, INC. ("Graphnet") and TELENET COMMUNICATIONS CORPORATION ("Telenet") authority, pursuant to Communications Act § 214, 47 U.S.C. § 214 (1970 & Supp. V. 1975), to extend their multi-city domestic record networks to various nations in Western Europe.

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\* "JA #" refers to the pages of the Joint Appendix being filed by Petitioners RCA Globcom and ITT World Communications Inc. ("ITT Worldcom").

By virtue of such grants, the latter become the only carriers authorized to provide record services to the public both between points within the continental United States and between the continental United States and foreign overseas points. RCA Globcom and the country's other international record carriers ("IRCs"), the competitive targets of these new entrants into the overseas record market, have heretofore been (and currently are) effectively precluded by the Commission, not only from serving the public between points within the continental United States, but also from accepting or delivering overseas traffic within the continental United States except in five "gateway cities".\*

Graphnet and Telenet have not exercised the overseas authority which the FCC conferred on them by reason of their inability to date to reach agreements for joint operations with any of the foreign "administrations" (such as the British Post Office in the United Kingdom and the Deutsche Bundespost in the German Federal Republic) which operate the telecommunications networks within the countries the Commission has authorized the two American carriers to serve. Such "administrations" must receive and forward any American carrier's

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\* New York, San Francisco, Washington, D.C., Miami, and New Orleans.



transmissions if delivery is to be made to the intended recipients within such countries.

Instead, RCA Globcom and other IRCs are supplying an overseas capability to subscribers of Telenet and of several other specialized domestic data networks by the familiar means of interconnection between the domestic carriers' networks and the IRCs' overseas transmission facilities. RCA Globcom has also reached an agreement with Graphnet which would, once implemented, permit traffic originating with Graphnet subscribers to be sent overseas via RCA Globcom. The Decision, however, permits Graphnet and Telenet to pursue direct arrangements of their own with foreign administrations. These would enable them to by-pass the IRCs' overseas facilities and would deny to RCA Globcom the right to compete on equal terms in the domestic market.

In this brief we will show that the overseas authority which Graphnet and Telenet sought and obtained under Section 214, and still presumably seek to implement, should not have been granted. The Commission's selective extension to these applicants of competitive prerogatives enjoyed by no other carrier is, on this record, arbitrary, capricious, and an abuse of the Agency's discretion.

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission acted arbitrarily and capriciously and abused its discretion by departing from consistent administrative precedent in authorizing two domestic carriers to provide overseas record communications when (a) those carriers had, in fact, no effective capability of providing service to any foreign overseas point, and (b) their proposals for service could be implemented through interconnection of their facilities with those of RCA Globcom and other international record carriers ("IRCs")?

2. Whether the Commission's Decision, which authorizes the intervening domestic carriers to provide service between and among large numbers of American cities and Western Europe, while the IRCs remain restricted in the United States to a mere five "gateways", was arbitrary and capricious and an abuse of discretion by reason of the Agency's failure to assess the effects such unequal competition will have on the framework of the industry it regulates and on the IRCs' capacity to serve the public effectively?

We believe that the answer to each question is "yes". An affirmative answer to either one requires, we submit, a vacatur of the challenged license grants.



STATUTES INVOLVED

The provisions of the Communications Act of 1934, 48 Stat, 1064, as amended, 47 U.S.C. §§ 151-609 (1970 & Supp. V. 1975), and of other statutes and regulations significant to the argument herein are reproduced in an appendix at the back of this volume. Of particular salience is Communications Act § 214(a), 48 Stat. 1075 (1934), as amended, 47 U.S.C. § 214(a) (1970), which provides, in pertinent part, as follows:

"No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . . ."

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\* The Commission has consistently interpreted this provision as requiring its approval of the establishment and operation by a common carrier of a channel of communication ("line") in interstate or foreign commerce. This interpretation is not at issue in the present proceeding.

STATEMENT OF THE CASE

A. Nature of the Decision under Review

This case presents the basic question of how, and by whom, two (of many) emerging transmission technologies -- ones useful, in this instance, in providing more economical, efficient data communications services (JA 4) -- are to be made available to the American public for intercontinental communications between the United States and foreign overseas points.

The transmission technologies involved in the present case are facsimile and packet-switching.\* The parties seeking to employ them in overseas communications are:

(a) domestic carriers, Graphnet (facsimile) and Telenet (packet-switching), which, over the last three years, have applied these technologies within the United States (JA 6); and

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\* The natures of these techniques, and their utility, which is not in dispute, are described at pp. 19-22. infra. See also JA 2-5.



(b) established international record carriers, including RCA Globcom,\* which currently apply these technologies, and stand ready to apply them, to the extent that foreign "administrations", in light of their own needs and requirements, are prepared to accept them.\*\* (JA 4-5, 31)

This country's overseas record transmissions are supplied by RCA Globcom and other IRCs which do not, themselves, participate directly in the domestic market, but which

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\* The other principal IRCs also are parties to this proceeding -- Petitioner ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and Intervenor WESTERN UNION INTERNATIONAL, INC. ("WUI") and TRT TELECOMMUNICATIONS INC. ("TRT"). WUI, although the successor to certain properties of The Western Union Telegraph Company ("Western Union"), is independent of, and not a corporate affiliate of, that domestic carrier.

\*\* The capabilities of such administrations have a significant bearing upon "innovation" in international communications. Any carrier providing an overseas service operates in a world of sovereign nations. No American carrier communicates directly with customers in any major foreign nation. International services are provided jointly by national administrations, each of which provides, in its own fashion, for the collection and distribution of traffic within its borders. Thus any carrier can send abroad only what its foreign counterparts will accept, and it can receive only what another administration will transmit. Almost inevitably, an innovation of consequence must appear "first" in some nation's domestic service where uniformity of national policies and conditions reduces barriers to service implementation. Subsequently, it is likely to be adopted in other lands and in the international services connecting such jurisdictions.



are permitted, and may be required, see Communications Act § 201(a), 47 U.S.C. § 201(a)(1970), to interconnect their facilities with those of domestic carriers to provide the public with "through" service.

In the present proceeding, the Commission considered, and disposed of, applications filed by Graphnet and Telenet, pursuant to Communications Act § 214, for authority to extend their existing domestic networks to Western Europe. The Commission's option to accept or reject those applications posed the question of how, from among the available alternatives, their subscribers were to obtain a foreign overseas capability. Radically departing from long-established practice, the Agency's Decision granted the domestic carriers their requested authority.

As we show hereafter (pp. 27, 35-38, infra), neither Telenet nor Graphnet has been able, for want of necessary arrangements with the foreign administrations in the countries they wish to serve, to implement the authority granted by the Decision.

Their authority to proceed unilaterally still exists, however. And, in our view, it should be revoked. The Commission's Decision represents an arbitrary and capricious veer in regulatory course. It is an inadequately studied and insufficiently explained repudiation of established practices upon which



RCA Globcom and others have long relied in developing their own competitive communications offerings. If implemented, the Decision would afford the American public no services which are not available or which could not be made available through the familiar interconnection procedures; it would threaten unnecessarily the supply of other international services; and it would expose RCA Globcom and the other IRCs to harsh and unfair competitive disadvantage.

B. Industry Affected by Decision

The Commission's Decision authorizes a selective departure from an industry structure which the Commission, in the exercise of its discretion, has maintained in the American record communications business since organizational reforms were made to meet the extraordinary telecommunications requirements of the Second World War\* and the Congress enacted, in 1943, Communications Act § 222, 57 Stat. 5, as amended, 47 U.S.C. § 222 (1970 & Supp. V. 1975).

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\* Before the war RCA Globcom maintained offices in many American cities, and connecting circuits, for the receipt and delivery of traffic. See International Record Carriers' Scope of Operations, 54 F.C.C.2d 909, 912 (1975). Most of these were eliminated as part of the wartime mobilization of the nation's existing communications plant. By reason of the Commission's post-war licensing policies, discussed in the text, they have not, in general, been restored. Other IRCs have had analogous experiences.



Section 222 provided the legal authority for the merger that year, under Commission supervision, of The Western Union Telegraph Company ("Western Union") and the former Postal Telegraph, Inc., then the country's two principal domestic telegraph carriers. See Application for Merger of Western Union Tel. Co., 10 F.C.C. 148 (1943). As a condition of the merger, Western Union was required to divest itself of a cables division through which it then also provided service to most of the world, see Communications Act § 222(c), 47 U.S.C. § 222(c) (1970 & Supp. V. 1975).\*

Since that time, the Commission also has restricted the IRCs to the provision of communications between a small number of "gateway cities", where they may receive traffic from and deliver traffic to customers, and overseas points, and it has refused their repeated requests for additional "gateways".\*\*

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\* Intervenor WUI, a company independent of Western Union, is the successor to this overseas business. See Western Union Divestment, 30 F.C.C. 323 (1961); cf. Western Union Tel. Co. v. United States, 267 F. 2d 715 (2d Cir. 1959). Pending the divestiture, Western Union was required by Section 222(e) (4) to hold its cable properties separate from the domestic enterprise. Other provisions of the merger statute also severed traffic interchange agreements between Postal Telegraph and predecessor companies of ITT Worldcom. See Communications Act § 222(e)(1), 47 U.S.C. § 222(e)(1) (1970); Separate Report on International Formula, 10 F.C.C. 184 (1943).

\*\* RCA Globcom and the other principal IRCs all have, as "gateways", New York, San Francisco, Washington, Miami and New Orleans. The Commission has had pending on its calendar for many years unacted upon requests of the IRCs for additional "gateways". See International Record Carriers' Scope of Operations, 38 F.C.C.2d 543 (1972); 54 F.C.C.2d 532 (1975); 58 F.C.C.2d 250 (1976).



Customers in the "hinterland" must, and customers within the "gateways" also may, obtain access to the overseas circuits through the facilities of domestic carriers which interconnect with the IRCs.\*

While the Western Union merger explains the origins of this pattern, it is the product of Commission discretion, not of the statute authorizing the merger. Communications Act § 222 does restrict to the domestic arena carriers (i.e., Western Union) which have merged under it, see Western Union International, Inc. v. FCC, 544 F.2d 87 (2d Cir. 1976), cert. denied, 98 S.Ct. 299 (1977), but the Commission has rejected Western Union's reciprocal claim that it excludes unmerged

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\* Conventionally the international portion of an overseas communications service is provided by means of circuits which an American IRC jointly establishes and maintains with a national carrier operating in the foreign country concerned. Communications Act § 211, 47 U.S.C. § 211 (1970), requires the American participant in these arrangements to file with the Commission the operating agreements and other contractual arrangements which apply to such services.

The overseas circuitry is supplied, in the main, through various submarine cables which the IRCs have financed jointly and concurrently use with American telephone and foreign carriers, see, e.g., American Tel. & Tel. Co., 35 F.C.C.2d 801, 822-23 (1972), amended, 39 F.C.C.2d 865, amended, 40 F.C.C.2d 913 (1973), and through the facilities of the international communications satellites, see Overseas Communications, 30 F.C.C.2d 571 (1971), of the INTELSAT system created by treaty, see 23 U.S.T. 3813 (1973) (definitive arrangements); 15 U.S.T. 1705 (1964) (interim arrangements).



international carriers from the provision of domestic services, RCA Global Communications, Inc., 42 F.C.C.2d 774, 779 (1973), aff'd sub nom. Network Project v. FCC, 511 F.2d 786 (D.C.Cir. 1975).<sup>\*</sup> See also Domestic Communications-Satellite Facilities (Second Report and Order), 35 F.C.C.2d 844, 851 (1972); Domestic Communications-Satellite Facilities (Proposed Second Report and Order), 34 F.C.C.2d 9, 48-49 (Chief, Common Carrier Bureau 1972).

The communications offerings which RCA Globcom and the other IRCs have been authorized to provide between the "gateways" and overseas points have long included telegrams and teleprinter exchange ("telex") service. In the second decade after the Second World War, the appearance of the modern, high-capacity submarine cable and of the communications satellite enabled the IRCs to expand their offerings expanded to

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\* In that case the Commission granted (over objections by Western Union) authority to RCA Globcom to begin construction and operation of an interim domestic satellite communications system employing, for the space links, facilities leased in Canadian satellites. Subsequently, as a condition of the use of a later generation of American satellites to be launched by RCA, the Commission required RCA Globcom to divest its domestic satellite system to a separate, arm's length corporate affiliate. RCA Global Communications, Inc., 56 F.C.C.2d 660 (1975). The Commission cited, as the reason for this ruling, a desire to avoid what it thought was the possibility of cross-subsidization of the domestic service by the overseas service, id. at 667-70.



include private-line services\* for alternate voice/data\*\* use, American Tel. & Tel. Co., 37 F.C.C. 1151 (1964), and, in the cases of RCA Globcom, ITT Worldcom, and WUI, intercontinental television transmission service, see STA for TV Service via Satellite, 1 F.C.C.2d 82, amended, 1 F.C.C.2d 415 (1965), modified, 18 F.C.C.2d 402 (1969), modified, 20 F.C.C.2d 965 (1970).

During the last decade, in the wake of rapid advances in computerized switching and other transmission technologies, RCA Globcom has put several more sophisticated services on-line (e.g., "Datel", a switched data communications service to many countries, and "Q-Fax", a high-speed facsimile service to Japan). Still other service and facilities improvements are

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\* A private (or "leased") line is a circuit made available to a customer for his full-time use for communications between two or more fixed points. See 47 C.F.R. § 43.61(a)(6) (1976). Such service has its chief utility for communicators with large volumes of traffic between defined locations. It is to be distinguished from a "switched" service (e.g., telex) which provides the customer with access on a "demand" basis to a switching network which connects large numbers of subscribers (hundreds of millions in the paradigmatic case of the interconnected public message telephone systems serving countries around the world).

\*\* "Data" is a term which has variable meanings. Here it is a generic concept which refers to any information which may be expressed in a record mode. The term also is sometimes applied to the inputs and outputs of computers which process information expressed as "bits," the fundamental on-off units of the binary system of notation.



the subject of active joint planning with administrations in Europe and the Pacific Basin. Some of the services near the present edge of this moving frontier are involved in this case, and they are considered in more detail hereafter. (See pp. 19-26, 35-38, infra.)

So far as service within the United States is concerned, the Commission has continued to confine the IRCs to their limited number of "gateways" even though it has, in recent years, authorized many other carriers to operate domestically in competition with Western Union and American Telephone & Telegraph Company ("AT&T") and the other telephone companies (which also supply extensive domestic record services).\*

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\* The Commission authorized the operation of the first so-called "specialized domestic common carrier" in 1969. Microwave Communications, Inc., 18 F.C.C.2d 953 (1969). Subsequent Commission decisions have established, in effect, a policy of substantially unlimited market entry for domestic carriers of various kinds. See Specialized Common Carrier Services, 29 F.C.C.2d 870, reconsideration denied, 31 F.C.C.2d 1106 (1971), aff'd sub nom. Washington U. & T. Commission v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); Domestic Communications-Satellite Facilities (Second Report and Order), 35 F.C.C.2d 844 (1972); Packet Communications, Inc., 43 F.C.C.2d 922 (1973); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), modified on reconsideration, 62 F.C.C.2d 588 (1977), aff'd sub. nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. applied for sub nom. International Business Machines Corp. v. FCC, 46

(Footnote continued on next page)



Despite the Commission's long insistence in non-private-line services to foreign overseas points on a "country-to-country" rate structure, the Agency has not even allowed the IRCs to afford, at their expense, "free access" to their gateway message centers for "hinterland" customers.\* See All American Cables and Radio, Inc., 15 F.C.C. 293 (1950); International Record Carriers' Scope of Operations, 40 F.C.C.2d 1082, 1086 (1973). Except for a recent Order "equalizing" inter sese the gateways of the four principal IRCs, International Record Carriers'

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(Footnote continued from previous page)

U.S.L.W. 3694 (U.S. Apr. 26, 1978). In Domestic Communications-Satellite Facilities (Second Report and Order), supra, the Commission recognized that Communications Act § 222 posed no bar to the entry of the IRCs into domestic service if the Commission, in its discretion, saw fit to admit them. (35 F.C.C.2d at 851)

- \* The "country-to-country" rate concept requires that the tariff rate for a given item of traffic be the same from any point in the United States to a given foreign point (e.g., the same from Denver to Paris as from New York to Paris). If an interconnected domestic carrier and an IRC share in a given transmission, they share, subject to Commission supervision and regulation, in the applicable "country-to-country" toll. The "free access" issue concerns the question of how a "hinterland" customer (in, say, Chicago) can obtain the benefit of the "country-to-country" toll. He can have it, according to the Commission's policies, only if he accesses an IRC's overseas circuits through a domestic carrier which is generally interconnected with the IRC for that type of service. Any ad hoc "hinterland" access to an IRC's facilities (by, e.g., a leased line or a dial-up call through the public message telephone system) must be at the customer's expense in addition to the "country-to-country" toll. See Western Union Tel. Co., 29 F.C.C.2d 422 (1971).



Scope of Operations, 54 F.C.C. 2d 909 (1975)\*, the Commission has taken no action on the long-standing requests by the IRCs for the opportunity to open additional gateways, and thus to deal directly with potential overseas communicators in major cities throughout the country, see International Record Carriers' Scope of Operations, 58 F.C.C.2d 250 (1976). The Agency has done so despite its acknowledgement that the opening of at least some additional "gateways" by the IRCs would serve the public interest. International Record Carriers' Scope of Operations, 54 F.C.C.2d 532, 533 (1975).\*\*

Additionally, a series of Commission decisions has denied, at least temporarily, to both RCA Globcom (a subsidiary of RCA Corporation) and ITT Worldcom (a subsidiary company

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\* Prior to this Order, RCA Globcom, ITT Worldcom, and WUI had "gateways" in New York, San Francisco, and Washington, and TRT in Miami and New Orleans. The Order authorized each of the IRCs to maintain "gateways" in all of the five cities; the Commission commented with respect to this grant that "considerations of fair competition require that all carriers serving the same [*i.e.*, overseas] points be given equal treatment." (54 F.C.C.2d at 920)

\*\* The various International Record Carriers' decisions cited in this paragraph were all issued in a Commission Docket No. 19660. The latter, which has been pending, inconclusively and largely inactively, for some six years was initiated by the Agency as a vehicle for its consideration, in a systematic way, of precisely the questions of market structure which the Commission undertook to address so summarily in this case. See International Record Carriers' Scope of Operations, 38 F.C.C.2d 543 (1972).



of International Telephone & Telegraph Corporation) the right to interconnect their circuits with those of domestic carriers which are corporate affiliates -- either because the domestic carrier is a subsidiary of the IRC concerned or under common corporate ownership with it. See RCA Globcom Systems, Inc., FCC File No. W-P-C 1396, (Memorandum Opinion, Order, and Certificate of Chief Common Carrier Bureau April 18, 1978); ITT Domestic Transmission Systems, Inc., 62 F.C.C. 2d 236 (1976); RCA Global Communications, Inc., 56 F.C.C. 2d 660 (1975); United States Transmissions Systems, Inc., 48 F.C.C. 2d 859 (1974), reconsideration denied, 51 F.C.C. 2d 207 (1975), aff'd sub nom. American Tel & Tel. Co. v. FCC, 539 F.2d 767 (D.C. Cir. 1976). The matter of such interconnection has been deferred pending the Commission's long-promised, but oft-postponed, address to the "gateway" issue in its Docket No. 19660.

Indeed, the Commission has gone so far as to require RCA Globcom to spin off to a separate, arm's-length corporate affiliate, RCA American Communications, Inc., the facilities and organization which RCA Globcom had developed internally to operate a domestic satellite system.\* RCA Global Communications, Inc., 56 F.C.C.2d 660, 670-72, 700 (1975).

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\* With respect to this ruling, see also the discussion at pp. 12-13 and fn.\* on p. 13, supra.

By citing these many instances, we do not mean to suggest that the Commission has rationalized every ruling over a quarter-century in precisely the same terms. But collectively, these decisions add up to a policy which has effectively limited the IRCs to the pursuit of overseas traffic in a few gateways while, at the same time, confining to the domestic arena those record carriers free to carry on domestic business and to seek customers throughout the continental United States.

C. The Emerging Transmission Technologies

The Commission authorized Graphnet and Telenet to go into business domestically in 1974 as two of the first so-called "value-added" carriers. See Graphnet Systems, Inc., 44 F.C.C.2d 800 (1974); Telenet Communications Corp., 46 F.C.C.2d 680 (1974). These are carriers which lease inter-city trunk circuits from an underlying domestic carrier (usually, but not necessarily, AT&T), employ them in conjunction with a transmission technique or technology which is said to "add value" to the service afforded by the underlying circuits, and offer the resulting package to the public on a common carriage basis.\*

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\* If an analogy were to be drawn to merchant shipping, it might be said that the "value-added" carriers lease their ships and supply the cranes, containers, etc. with which the vessels are loaded and unloaded. The capabilities of both the ships and the loading equipment have a bearing on what cargo may fruitfully be carried, and at what expense and speed, between points A and B.



The Commission licensed each such carrier to link, by its leased inter-city circuits, operating offices in metropolitan centers throughout the country and to site at each such office one or another of the "processors" or "concentrators" which impart the "added value" to its service.\* Including expansion since the applications in suit were filed, Graphnet now offers access to its facilities in approximately fifty cities and Telenet in over eighty. A subscriber to either of these systems accesses one of its operating offices by means of his choice (usually a dedicated line leased from a local telephone company or a dial-up call through the public message telephone system\*\*).

Graphnet's processing equipment is designed for, and the "value" it "adds" relates to, facsimile transmissions.\*\*\*

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\* As in most switched systems, there was and is a hierarchy among the offices. Most are, in a sense, satellites which route traffic through and receive traffic from one or more of a relatively few primary centers which, inter alia, perform network control functions. See Graphnet Systems, Inc., 44 F.C.C.2d 800 (1974); Telenet Communications Corp., 46 F.C.C.2d 680 (1974); JA 45, 76.

\*\* The conventional telephone line employs a so-called "voice-grade" circuit (one with a band width of about 4 kiloHertz). If appropriate end-line equipment is attached such circuits can transmit record data such as a page of this brief or the output of a computer.

\*\*\* The most common manifestation of the facsimile technique is the conventional office "telecopier". A number of concerns, most notably Xerox Corporation, market terminal devices which scan a page and create accoustical inputs to an ordinary telephone handset and line. These inputs will reproduce, at a compatible machine at the other end, an 8 1/2 x 11" sheet in about four minutes.

The equipment accepts and records inputs from a variety of facsimile terminal and from teleprinters and other devices. It processes the inputs by a computerized technique, known as a "store and forward," whereby they can be sent over the system's inter-city links at very high speed, thus reducing the time (and cost) required for this portion of the transmission. Graphnet's office at the "other" end passes on the traffic addressed to a subscriber in a form appropriate for creating an output at his facsimile terminal. (JA 5, 31)

Telenet's processing equipment is designed for the transmission of computer data by a technique, pioneered by the Department of Defense, which is known as "packet-switching". Many computer applications are "interactive," involving, in effect, a "dialogue" between a human user at one terminal and a data base at another.\* Such exchanges are likely to involve considerable amounts of "dead time" when no information is passing in either direction. The "dead time" represents, when

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\* An example would be a lawyer's search for authority by means of a computerized legal research system such as "Lexis". An initial inquiry to the system's data base probably would produce a response which would prompt the lawyer to further refine his search instructions to the computer. The back-and-forth might well go on for quite some time.



long-distance calls are involved, an expensive use of circuit capacity.\*

Packet-switching technology represents one address to this problem. Instead of establishing a discrete circuit between the communicating parties, a packet-switching "concentrator" processes an input into "packets" of data, each containing about 1,000 "bits" of information\*\* (JA 97), and separately forwards each packet to a destination office by whatever circuit is free at the time to carry a packet there.\*\*\* The destination office passes on the packets to the intended recipient.

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\* A somewhat similar situation can arise in almost any two-way communication. In many intercontinental systems, the carrier assigns the circuits dynamically so that a communicator is seized of an outbound transmission path only when he is actually sending. This technique increases the effective capacity of, and reduces the cost, per call, of using, intercontinental facilities.

\*\* "Bit" is a contraction for "binary digit", the smallest unit of information in the binary system of notation used to process data in computers. A bit represents a choice between a mark or space (one or zero) condition. Those conditions can be expressed electronically as "on" or "off" conditions. See J. Martin, Future Developments in Telecommunications 633 (2d ed. 1977).

\*\*\* The processor includes in each packet it forms some bits which serve as a routing indicator (in effect, an address) for the packet. This form of transmission is said to create a "virtual circuit" between the connected points. An actual circuit may carry, successively, packets which constitute parts of different items of traffic, and the successive packets constituting a particular item of traffic may travel over different circuits.



The domestic networks of Graphnet and Telenet represent two of several recent efforts to respond to the communications needs and opportunities created by the rapid spread of data and facsimile terminal devices. (JA 2) For example, since about 1960 AT&T has provided a domestic Dataphone service which enables subscribers to send data and facsimile transmissions on a switched (*i.e.*, call-up, rather than private-line) basis through the public domestic message telephone system, but this service involves no transmission technology beyond that engineered into the telephone system for its primary voice function and that which the subscriber supplies by his own end-line equipment.\*

In 1973 the Commission licensed another "value added" carrier, Packet Communications, Inc., to provide a domestic

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\* RCA Globcom since 1964 and ITT Worldcom and WUI since shortly thereafter have offered an analogous service to several overseas points in Europe, Asia and Latin America under the tradename of "Datel". The utility of this system to the public has been hampered by the IRCs' inability to obtain effective interconnection of their circuits with the AT&T network, a matter which has been before the Commission, without resolution, for six years. See Overseas Dataphone Service, 57 F.C.C.2d 705 (1976), aff'd sub nom. ITT World Communications Inc. v. FCC, 555 F.2d 1125 (2d Cir. 1977). Customers also may access RCA Globcom's Datel network by leased line, by the domestic Broadband Exchange Service ("BEX") of Western Union, and through the domestic network of Southern Pacific Communications. The Commission, in commenting on RCA Globcom's requests for interconnection with AT&T, has noted RCA Globcom's capacity to supply such features as "code conversion, multi-address capability, camp-on capability, overseas conditioned channels, deferred data mode, speed conversion and other individualized features that AT&T has not proposed to offer." (57 F.C.C.2d at 707)



service seemingly comparable, in all significant respects, to Telenet's. Packet Communications, Inc., 43 F.C.C.2d 922 (1973). In 1974 the Commission authorized a domestic subsidiary of ITT to construct and operate a 59-city network which would offer, inter alia, data transmission in the switched mode. See United States Transmission Systems, Inc., 48 F.C.C.2d 859 (1974), reconsideration denied, 51 F.C.C.2d 207 (1975), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 539 F.2d 767 (D.C.Cir. 1976). More recently, in the wake of the Agency's Resale and Shared Use decision,\* the Commission has licensed Tymnet, Inc. to operate as a resale carrier offering switched data service by means of virtual circuit switching techniques, rather than packet switching. Tymnet, Inc., 65 F.C.C.2d 247 (1976).

Meanwhile, in the industrialized countries of Europe and Asia, where the distribution of data terminals is growing, but still lags somewhat behind that in the United States,\*\* the

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\* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C. 2d 261 (1976), modified on reconsideration, 62 F.C.C.2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. applied for sub nom. International Business Machines Corp. v. FCC, 46 U.S.L.W. 3694 (U.S. Apr. 26, 1978).

\*\* See Overseas Dataphone Service, 57 F.C.C.2d 705, 707 (1976), aff'd sub nom. ITT World Communications Inc. v. FCC, 555 F.2d 1125 (2d Cir. 1977).

various national administrations have developed and are gradually implementing, plans for specialized data networks at paces appropriate, in their judgments, to their respective countries' needs.

In 1976, for example, the British Post Office began the testing of an Experimental Packet Switching System, and the Postal, Telephone and Telegraph Administration ("PTT") of France let contracts for the construction of a public packet-switching network in that country. Japan's Nippon Telephone & Telegraph Corporation expects to have a similar network in commercial service by the end of the decade. The PTTs of the European Economic Community plan to place in operation in the near future a multi-national private packet-switching network with the possibility that it will offer call-up services to the public at a later date.\* (JA 100-01)

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\* In addition to the matter of terminal supply, another consideration, unfamiliar to most Americans, may be at work in particular foreign countries. This concerns the availability of communications plant and investment capital which can be allocated to specialized services without detriment to the "simpler" services most citizens employ. A given administration could well view the expansion of telephone service to homes in burgeoning suburbs and the rural countryside as a higher priority than extensive packet-switching networks. The mere existence of a technology does not, for any number of reasons, assure its immediate acceptance everywhere. Cf. British Airways Board v. Port Authority, 564 F.2d 1002 (2d Cir. 1977) (the "Concorde").



The intergovernmental CCITT\* is presently working on various recommended standards for the operation of international data network, including recommendations for detailed specifications for the call progress signals and packet-mode interface protocol to be utilized for the connection of computer equipment to public packet networks. (JA 102, 258)

D. The Section 214 Applications at Issue

On various dates in 1976 the Commission received and in its Decision of January 11, 1977 it granted applications filed by four carriers under Communications Act § 214, 47 U.S.C. § 214 (1970 and Supp. V. 1975), for authority to provide to various European points data and facsimile services not then available.

1. The Authorizations Requested

Telenet sought authority to extend its domestic packet-switched network to the United Kingdom and points

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\* "CCITT" is the French-language acronym for the unit of the International Telecommunications Union, an intergovernmental organization based in Geneva of which the United States is a member, which promulgates recommended international telecommunications standards. For the CCITT's charter in the current constituent act of the ITU, see International Telecommunications Convention (Malaga-Torreblancas), \_\_\_ U.S.T. \_\_\_, T.I.A.S. No. 8572 (1973).

beyond\* (JA 2, 82) and Graphnet to provide facsimile services from its domestic networks to terminal devices in eleven Western European countries (JA 3, 45). As the means of overseas communications, both carriers contemplated leasing INTELSAT circuits from the Communications Satellite Corporation ("Comsat") and terrestrial facilities from AT&T to link certain of their message centers\*\* and the INTELSAT earth stations in Andover, Maine and Etam, West Virginia. Neither application was accompanied, however, by an operating agreement indicating that any foreign administration was prepared to operate with these carriers and directly receive their transmissions.\*\*\* (JA 7)

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\* Subsequently, Telenet requested and received authority, jointly with the Hawaiian Telephone Company, to extend its domestic network to Hawaii, an "international", but non-foreign, point within the meaning of Communications Act § 222(a), 47 U.S.C. § 222 (a) (1970). Thus Telenet and Hawaiian Telephone currently are providing a joint packet-switched service between the continental mainland and the island State. See Telenet Communications Corp./Hawaiian Tel. Co., File No. I-T-C 2676 (1977) (Chief, Common Carrier Bureau Dec. 15, 1977). The Commission has, on several occasions, exercised its discretion to allow domestic carriers to engage in "international telegraph operations" between the mainland and Hawaii, although it has not previously so acted in the case of public service to foreign overseas points.

\*\* Graphnet sought to access the earth stations from New York and Telenet from Washington and from Boston (JA 56, 89), which is not at present an IRC "gateway". The overseas circuitry proposed by each carrier would handle traffic received by it at any point on its domestic system. (JA 3)

\*\*\* Under the procedures of the INTELSAT consortium, Comsat, the American member of that body, provides only half of



RCA Globcom filed for authority to utilize its existing circuits to the Netherlands to supply, under the style of "Datel II", a switched data service which would be offered at transmission speeds considerably higher (up to 9600 bits per second) than those theretofore available (JA 2, 480) and which would use statistical multiplexing and dynamic bandwidth allocation techniques to obtain improved utilization of bearer channels (JA 480). The system is potentially capable of operating in computerized circuit-switched and packet-switched modes. RCA Globcom contemplated that access to the system in this country would be afforded by customers' dedicated lines to its operating center and by interconnection with domestic networks. The application was accompanied by the agreement of The Netherlands' PT&T, indicating its ability and willingness to cooperate in providing the service. (JA 488) While the application was pending the Commission granted RCA Globcom temporary authority to begin service in October 1976. (JA 2)

WUI sought authority to modify its existing facilities to the United Kingdom so as to provide a Data-base service, using

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(Footnote continued from previous page)

an international circuit between the United States and a foreign point, i.e., the "up link" from the American earth station to the satellite. (See JA 209.) Another, foreign carrier is required to bring the circuit "down" on the far side and to continue it beyond the foreign earth station.

computerized circuit-switching and statistical multiplexing techniques. The facilities would be interconnected in this country with the domestic network of Tymnet, Inc. and would be operated in accordance with the latter's network protocols. (JA 2, 507) As in the case of RCA Globcom's application, WUI's filing included an appropriate operating agreement with the foreign administration concerned, viz., the British Post Office. (JA 511)

2. The IRCs' Opposition to Graphnet and Telenet

The IRCs objected below, and RCA Globcom renews here its opposition, to the applications of Telenet and Graphnet. (JA 137, 148, 160, 188, 196, 207, 212, 220, 230, 245, 251, 253, 260, 364, 377, 385, 397, 409, 424, 669, 698, 781, 798) Putting to one side unavailing discretionary appeals inappropriate for reconsideration at this stage, the IRCs, including RCA Globcom, pressed several more categorical objections, whose rejection warrants, in our view, reversal of the Commission's Decision.

First, the domestic carriers' applications, if granted, would shatter in a one-sided way the distinction which the Commission's policies have maintained over the decades between the domestic and overseas spheres in American record telecommunications. (JA 202, 249, 271, 681, 700, 783) The Commission



could not validly assess the "public interest" aspects of such applications without considering, in far greater detail than a conventional Section 214 proceeding allowed, the effects on all other carriers, both international and domestic, of the selective treatment afforded Graphnet and Telenet. (JA 273, 685-86, 700-02, 783-86)

The IRCs have effectively established in the past, and may be expected to establish in the future, interconnections with domestic carriers to provide "through" services to "hinterland" communicators. (Indeed, such interconnection represents in practice, no less than theory, a viable alternative to the overseas proposals here in issue.) The IRCs have also sought the right -- which they have thus far been denied -- to handle the domestic portion of overseas calls. Given these conditions which are largely the product of FCC policy, an IRC would be at a harsh disadvantage in competing for the traffic of "hinterland" customers if the latter could obtain, in "one stop" at either Telenet or Graphnet, both domestic and international service.\*

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\* The Commission has in the past commented:

"The IRCs do not compete only in the gateways. Rather, a significant portion of the IRCs' overseas traffic comes from the hinterland. Accordingly, we believe that competitive feasibility must be measured where competition occurs -- for the United States market as a whole." International Record Carriers' Scope of Operations, 58 F.C.C.2d 250, 259 (1976).

(JA 271, 683) Graphnet represents a particularly acute threat since facsimile is, for many purposes, an obvious functional equivalent of telex and telegrams, the IRCs' principal public offerings.\*

Second, in the absence of operating agreements with foreign administrations which explained how, and pursuant to what toll practices, Telenet and Graphnet expected to reach anyone abroad, the Commission could not pass upon the "public interest" aspect of the domestic carriers' applications. (JA 139, 162, 191-92, 222, 248, 252, 379, 412-13, 429, 676-77) Without such agreements, an applicant's filing, however "imaginative", is fictional, and the Commission could scarcely

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\* Outside of the "gateways" overseas teleprinter exchange service is provided by interconnection of the IRCs' networks with one or another of two domestic networks operated by Western Union and known as "Telex" and "TWX". Western Union, unlike the IRCs in the "gateways", conditions the availability of its service on the payment by subscribers of substantial minimum monthly charges. See Customer Use of Telex Service, 62 F.C.C.2d 414 (1976). A Telex or TWX subscriber who takes that service principally because of its overseas capability (through interconnection with the IRCs) might well abandon it if a readily accessible overseas facsimile alternative were available. The IRCs, though precluded by the FCC from themselves directly offering a realistic "hinterland" alternative, would lose out completely on this traffic if facsimile were provided through a domestic carrier which had an overseas capability of its own.



assess what the applicant was, in fact, able to provide the public.\*

Third, if the Commission granted the selective requests of Graphnet and Telenet for authority to operate from many United States cities to Western Europe, other elements of the international service would be exposed to harm. (JA 263, 381, 678, 800)

The Commission, by allowing a domestic carrier to operate abroad on terms of United States access different from those afforded the IRCs, would give it the capability of dominating the relevant markets to the virtual exclusion of the IRCs. Moreover, a Telenet or Graphnet, after "skimming the cream" of service to a few major countries in Western Europe, may have little incentive to further expand its system to reach minor communications points, such as Uruguay or Liberia.

The indigenous capacity, and need, to handle sophisticated transmission techniques is likely to develop less

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\* See, e.g., Commercial Cable Co., 28 F.C.C. 283, 290 (1960); cf., New England Tel. & Tel. Co., 17 F.C.C.2d 33 (1969). The present case scarcely was one in which the Commission could view as presumptively "routine" any agreements which might be negotiated by Telenet and Graphnet. Their applications involved forms of service which no carrier, American or foreign, had theretofore offered in any overseas service.

extensively in such jurisdictions than in, say, the Common Market or Japan. The task of meeting the needs of subscribers potentially interested in reaching the less-developed portions of the world presumably would be left to the IRCs, which would have to do it without the cost-spreading benefits of traffic to economically more significant foreign centers.\*

### 3. The Commission's Ruling

The Commission rejected, almost in toto, the IRCs' arguments. Its only concession was to condition the exercise by Telenet and Graphnet of their grants upon their submission to the Commission for review of any operating agreements with foreign administrations, if and when achieved. (JA 7)

The Commission's Decision, after describing the four applications (JA 2-3), focuses at length on the desirability, which no one disputes, of improving data and facsimile services to overseas points. (JA 3-7) The Agency then lumped together

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\* The overseas record market is small when compared to the aggregates of the domestic telecommunications scene. The total traffic revenues of all four IRCs in 1976, the latest year for which industry-wide statistics are readily available, amounted to less than \$301 million. See Federal Communications Commission, Statistics of Communications Common Carriers: Year Ended December 31, 1976 at 158 (1977). Traffic to a relatively few countries provides the major economic support for organizational systems which permit service to many.



the four proposals -- the ones by RCA Globcom and WUI which overseas correspondents could accommodate and the ones by Telenet and Graphnet which those correspondents were not prepared to pursue -- and granted them all. The Agency explained its award by referring to "an existing need for the kind of new and innovative overseas data communications services discussed above" (JA 5), and by stating that "the entry of these four qualified applicants into the developing field of overseas data communication will make available to the public a variety of service offerings." (JA 6) The appearance of Telenet and Graphnet on the international scene also would represent, in the Commissions's view, a useful competitive stimulus. (JA 6-7)

The Decision discounted the competitive threat to the IRCs' other services represented by carriers free to solicit and handle both domestic and foreign business in all parts of the United States while the IRCs remain penned into their few "gateways." According to the Commission, RCA Globcom and the other IRCs enjoyed, overall, larger business volumes and more ancient reputations than the two domestic carriers. (JA 8) They could, if they wished, pursue further interconnection agreements with other American domestic carriers. (JA 8)

E. Developments Pending Reconsideration

RCA Globcom petitioned the Commission for a stay and reconsideration of the Decision insofar as it granted the applications of Telenet and Graphnet. The Commission denied the stay in an Order released on May 10, 1977 (64 F.C.C.2d 684; JA 17), and the petition for reconsideration in a Memorandum Opinion and Order released on April 3, 1978 (FCC No. 78-181, JA 20), in which the FCC reiterated the views it had previously expressed. ITT Worldcom had responded to the Decision with a petition to this Court which the parties held in abeyance pending the Agency's ruling on RCA Globcom's application.

Meanwhile, RCA Globcom's pursuit of more effective data communications services to overseas points continued. During the early months of 1977, it concluded interconnection agreements with Telenet and with Tymnet and operating agreements with the administrations of Belgium, France, Italy, Spain, and Switzerland.

On May 2, 1977 RCA Globcom filed with the Commission its application pursuant to Communications Act § 214 (File No. I-T-C-2657-1) for authority to provide to the aforesaid countries what it termed "Remote Global Computer Access Service" ("RGAS").\*

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\* RCGAS has since been renamed, commercially, as "RCA Globcom Low Speed Data Service", a term which refers to

(Footnote continued on next page)



The application contemplated the establishment of an RCA Globcom switching node in the New York area with corresponding nodes abroad and the creation between these nodes of a digital data capability which would accomodate both "packet-switching" and "a multiplicity of speeds in both synchronous and asynchronous transmission modes providing a data transmission system . . . employing the most current state-of-the-art transmission technologies". (At p.6)

The proposal provided for access to the RGCAS within the United States by

"means of either the public switched telephone network or private lines located within RCA Globcom's gateway cities, the Telenet domestic network, the Tymnet domestic network, or the networks of other U.S. data communications networks."\* (At p.3)

The Commission released its approval of this application on October 19, 1977. Service under a grant of

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(Footnote continued from previous page)

its capacity to handle data at up to 9600 bits per second. Specialized circuit configurations, of broader band width, can transmit at "faster " speeds.

- \* Unlike the overseas network extension plans which Telenet and Graphnet have been unable to implement, the overseas capability afforded by RCA Globcom's concept is not limited to the domestic subscribers of a particular carrier. It maximizes the chance of overseas access for all domestic carriers and does not limit it to the first one or two which rush to the Commission with incomplete "plans".

temporary authority was initiated with transmissions between this country and Switzerland on July 1, 1977. Subsequently, the Commission granted temporary and then permanent authority for operation of this service to the German Federal Republic, and applications now are pending before the Commission to extend RCA's aforesaid data network to Austria, Singapore, Hong Kong, and the Philippines.

With respect to facsimile traffic, RCA Globcom has interconnected its overseas transmissions facilities with the domestic network of Southern Pacific Communications and has indicated a willingness to do so with Graphnet so that facsimile traffic originating on those two systems has (or soon will have) the capability of reaching foreign administrations to the extent that the latter are prepared to accept it.

During 1977, ITT Worldcom and WUI also sought under Section 214, and were granted, authority to provide analagous foreign overseas services under different trade names. These applications, too, were supported by operating agreements of the appropriate overseas administrations.

On December 15, 1977, the Chief of the Commission's Common Carrier Bureau, commenting on the joint application of Hawaiian Telephone Company and Telenet for authority to extend the latter's network from the mainland to the island State, wrote:



"During the past year . . . the Commission has authorized Telenet to extend its service to the United Kingdom on a direct basis via interconnection with the British Post Office [the Decision under review here], and it has authorized three of the major International Record Carriers to provide similar services between the United States and various European countries: ITT World Communications Inc., Universal Data Transfer Service (UDTS); RCA Global Communications, Inc., Remote Global Computer Access Service (RGCAS); and Western Union International, Inc., Database Service (DBS). In each instance, these new IRC services will interconnect with Telenet's domestic network and thereby provide access to a number of overseas points from points throughout the continental United States." Telenet Communications Corp./Hawaiian Tel. Co., File No. 1-T-C 2676, at 2 (Released Dec, 15, 1977)

POINT I

THE COMMISSION'S CLAIM THAT ITS  
ADMISSION OF DOMESTIC CARRIERS  
TO THE OVERSEAS SERVICE WILL  
MEET AN UNMET PUBLIC NEED IS,  
ON THIS RECORD, ARBITRARY AND  
CAPRICIOUS

RCA Globcom seeks this Court's relief against the Decision's selective treatment, to RCA Globcom's substantial prejudice, of two domestic carriers in disregard of the Commission's long-standing policies with respect to the foreign overseas record market.

As the Commission itself has recently remarked, "considerations of fair competition require that all carriers serving the same [i.e., overseas] points be given equal treatment."

International Record Carriers' Scope of Operations, 54 F.C.C.2d 909, 920 (1975). Here, however, the Commission's actions would enable Graphnet and Telenet to compete on significantly more favorable terms than those currently allowed to RCA Globcom (and other IRCs) while they remain confined to a small number of "gateways".

The Commission says that its authorization to Graphnet and Telenet to serve Europe from dozens of American cities which it has made inaccessible to RCA Globcom (and other IRCs) except through interconnection serves the "public interest". (JA 5-6, 9-10, 31-32, 44). We will here show that, on this record, this conclusion is, in the words of the Administrative Procedure Act, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1976).

In the past the Commission has recognized that a record carrier's extension of an overseas service beyond the historic "gateways" would radically change the industry. See United States Transmission Systems, Inc., 51 F.C.C.2d 207, 209<sup>4</sup> (1975) ("ITT operations in the hinterland . . . [would] fundamentally alter the structure of the industry by altering the relationships between domestic and international carriers"); see also International Record Carriers' Scope of Operations, 40 F.C.C.2d 1082, 1086 (1973). The Commission's present departure



from even-handed treatment of all record carriers can be justified only by cogent reasons which have been carefully analyzed and adequately explained. Such reasons, we submit, are lacking in this case.

The Commission has not, for example, attempted a systematic reconsideration of industry structure and an assessment of the "public interest" values which might conceivably be served by a structural alteration applicable to all carriers wishing to serve overseas points. (JA 36, 39, 266, 675) RCA Globcom suggested such a course below\* (JA 685-86), but the Commission elected to defer it to a possible later day (JA 36, 39). Instead, the Commission has ordained two "special cases" because, in the Agency's view, they have a supposed justification in the particular circumstances of this record.

The Commission's proffered explanation, stripped to its essentials, is this: Graphnet and Telenet filed proposals which, when they arrived at the Commission Secretary's office, described forms of service which, at that time, were in a developmental state but not yet available from this country to Europe. (JA 5, 31). The Commission thereby concluded the grant of the

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\* A possible vehicle for such a study would be Commission Docket 19660, captioned International Record Carriers' Scope of Operations, which has been pending inconclusively on the Agency's calendars for six years.

two domestic carriers' applications would serve unmet public needs. (JA 5-6, 32, 44)

This, we submit, is not a syllogism, but a nonsequitur. To begin with, the Commission ignored altogether the question of whether the applications of Graphnet and Telenet represented plans which could then be implemented in the international arena or were simply their sponsors' visions. The applications were, quite plainly, the latter. The domestic carriers, unfamiliar with the ways of a multinational environment, had jumped the gun on the foreign administrations whose participation in any overseas service is essential. Graphnet and Telenet did not have (JA 7), and have yet to obtain, the operating agreements which they need before they can transmit anything abroad over their facilities.

Secondly, and as importantly, when assessing the domestic carriers' applications and the "need" they would meet, the Commission ignored another matter -- the alternative means of service to the public which could readily be expected through the familiar method of interconnections between domestic carriers and the IRCs. It was not a question below of whether -- of something against nothing -- but of how and by whom.\*

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\* In its Reconsideration Order, the Commission comments that "it was incumbent on [it] to determine how the public interest in the provision of this service could best be met" (JA 31). There is no hint it assessed alternative "how's."



RCA Globcom, working cooperatively, as it must, with foreign correspondents, was on line in 1977 with its Remote Global Computer Access Service. Through its interconnection features, this service has not only provided an overseas capability to Europe for subscribers of Tymnet and Telenet, but also for subscribers of other networks and for RCA Globcom's own direct customers. RGCAS soon will afford them all the capability of reaching additional parts of the world. Furthermore, ITT Worldcom and WUI have launched analogous services, and Graphnet and other domestic carriers have interconnected or agreed to interconnect their domestic facsimile networks with RCA Globcom and other IRCs. (See pp. 35-38, supra.)

Interconnection with the IRCs is, and always has been, a viable alternative by which subscribers of Graphnet and Telenet could obtain such overseas capability as foreign administrations were in a position to afford. The Commission never considered that alternative. Instead RCA Globcom and the other IRCs were victimized before the Agency by their "defeat" in a synthetic paper "race" to file an application without regard to whether it could be implemented or not.

New devices and procedures are routine in telecommunications. They have appeared, year after year, for decades and are likely to continue to do so for years to come. It is

the ability to put such developments to effective use with qualified foreign correspondents -- not the capacity to draft speculative plans on the assumption that London and Paris are two more American cities -- which has met and alone will continue to meet the public's desire for the overseas services at the highest attainable standard.

The Commission's grants to Graphnet and Telenet have overridden long-standing industry practices for reasons which are, we submit, too casual and too ad hoc to pass muster in this Court. A practice of such significance to the IRCs and the public they serve cannot properly be altered by the ad hominem fiat displayed here. As Circuit Judge John R. Brown wrote in his memorable, oft-quoted concurrence in Mary Carter Paint Co. v. FTC, 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965):

"Our complex society now demands administrative agencies. . . . But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

To the same effect is this Court's more recent statement in the Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532-33 (2d Cir. 1977) where it said:



"Here the Commission is seeking to change its policy, and, as held in Columbia Broadcasting System, Inc. v. FCC, 147 U.S.App.D.C. 175, 454 F.2d 1018, 1026 (1971), such changes in policy must be rationally and explicitly justified in order to assure 'that the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law.' Although an agency must be given flexibility to reexamine and reinterpret its previous holdings, it must clearly indicate and explain its action so as to enable completion of the task of judicial review. Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 806-09, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973) (plurality opinion). . . . We deal here with a change in such criteria, and hence we must find that the FCC had a rational, articulated explanation for its action in order to uphold its decision."

See also Secretary of Agriculture v. United States, 347 U.S. 645, 653-54 (1954); Garrett v. FCC, 513 F.2d 1056, 1060-61 (D.C. Cir. 1975); FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970); cf. Marco Sales Co. v. FTC, 453 F.2d 1, 6-7 (2d Cir. 1971); Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971); Rayonier Inc. v. NLRB, 380 F.2d 187, 189 (5th Cir. 1967).

## POINT II

THE COMMISSION ALSO HAS FAILED TO  
PROVIDE A REASONED ANALYSIS OF THE  
COMPETITIVE EFFECTS UPON THE IRCs,  
AND THEIR SERVICE TO THE PUBLIC, OF  
THE GRANTS TO GRAPHNET AND TELENET.

The Commission's Decision authorizing the two domestic carriers, Graphnet and Telenet, to provide service to

Western Europe is flawed not only by its misapprehension of the service "advantages" (actually non-existent) which such authorizations would afford the public.\* The Agency's Decision also is arbitrary and capricious and an abuse of discretion by reason of its failure fully to evaluate the likely effects, upon the IRCs and the public they serve, of the highly unequal terms of competition to which the IRCs would be exposed by implementation of the Decision.

As the Supreme Court remarked in Bowman Transportation, Inc. v. Arkansas - Best Freight System, Inc., 419 U.S. 281, 285 (1974), a "reviewing court must 'consider whether the [Agency's] decision was based on the consideration of the relevant factors'". Here, it seems plain, the Commission's was not. In its zeal to make available what it erroneously thought would be a service

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\* Cf. City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972):

"A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."

It is well established that, in an industry so closely regulated as telecommunications, competition per se, unaccompanied by a demonstration as to why it serves the public interest, provides insufficient warrant for new market entry. FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); RCA Global Communications, Inc. v. FCC, 559 F.2d 881 (2d Cir.), modified on other grounds, 563 F.2d 1 (2d Cir. 1977); Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974).



novelty on the North Atlantic, the Commission brushed aside virtually everything else. It was unwilling to realize that its authorizations to Graphnet and Telenet effected, de facto, a significant change in long-standing institutional arrangements in the overseas record industry and that such a change required a careful, balanced study of all its likely effects.\*

RCA Globcom and the other IRCs all sought to press upon the Commission what seems, to us at least, the self-evident prejudice of a situation in which Graphnet and Telenet could offer, through a single network, both domestic and overseas services and could offer them across the country, while the IRCs remain cooped up in a few "gateways" (JA 247, 271, 368, 386, 682, 692, 801, 807, 828). Under such a regime, the IRCs would be denied equal opportunity to pursue traffic of the kinds which Graphnet and Telenet seek to carry (JA 683), and they would be exposed, as well, to the diversion of traffic from their other

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\* The Commission disclaimed in this case the enunciation of a general policy of easy entry into the overseas service (JA 6, 34), and it thus viewed as unnecessary the "broad rule-making proceedings" (JA 34, see also JA 6) which preceded the articulation of such a policy in the domestic sphere, see Specialized Common Carrier Services, 24 F.C.C.2d 318 (1970), 29 F.C.C.2d 870, reconsideration denied, 31 F.C.C.2d 1106 (1971), aff'd sub nom. Washington U. & T. Comm. v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975). But even if the present ruling is sufficiently "special" to obviate the need for a full-scale rule-making, it is, nevertheless, significantly "different" from what preceded it. Thus it requires, if caprice is to be avoided, a comprehensive inquiry into all of its ramifications.

offerings. (JA 265-67) The latter danger is particularly acute in the case of telex, which represents, in terms of revenues, the IRCs' largest single service and, in terms of the numbers of subscribers involved, their most widely used offering. See Federal Communications Commission, Statistics of Communications Common Carriers: Year Ended December 31, 1976 at 158, 163-65 (1977). Any such diversion would obviously affect adversely the rates at which they could serve their remaining customers.

In responding to these showings, the Commission took refuge in irrelevancies and in the skepticism which, for lack of any other "answer", always can be invoked when the discussion concerns future probabilities. As to "equity" of the dissimilar terms upon which the IRCs and the two new entrants would be expected to compete, the Commission observed that the new entrants are smaller than the IRCs and that the latter could interconnect with other domestic carriers. (JA 7-8, 39-40)

All of this is true enough, but it scarcely explains why an unfair advantage ceases to be unfair when enjoyed by a small rather than a large competitor. Nor does it explain why interconnection with independent domestic carriers is as commercially advantageous as a direct service from the "hinter-land" to Europe. It plainly isn't. (JA 683) The Commission would not have been so resistant in the past to interconnections between



IRCs and their own corporate affiliates if it made no difference. (See pp. 17-18, supra and cases there cited.)

As for traffic diversion in the future, the Commission put aside the predictive value of its "expertise"; its Decision falls back on RCA Globcom's supposed failure to "describe the precise nature or degree of the competitive disadvantage it believes will accrue to it" and to present "probative evidence". (JA 8) When this issue was renewed in RCA Globcom's petition for reconsideration (JA 681), the Commission acknowledged that a "potential impact of the Graphnet authorization stems from the fact that one of the ways that the Graphnet network can be accessed is via a telex terminal." (JA 37) But it insisted that Graphnet and Telenet seek to supply overseas services which differ from those being offered by the IRCs at the time the domestic carriers filed their applications; thus the impact on the IRCs of the domestic carriers' appearance in the North Atlantic would be minimal. (JA 37-38)

This analysis ignores the fact that all forms of communications are simply alternative means of getting information from one place to another. The competitive threat posed to overseas telex includes, not only the occasional telex-to-facsimile transmission, but also facsimile-to-facsimile traffic\*

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\* A transmission from one office "telecopier" to another is the most common domestic manifestation of facsimile-to-facsimile traffic. It is, for many applications, a complete, and often superior, substitute for domestic telex.

and other methods which can carry information transmittable by telex and which, by reason of convenience of domestic access or for other reasons, can be viewed as a substitute for it.

If the growing capacities of foreign administrations now permit the increasing acceptance of such traffic abroad, a Graphnet or other carrier, equipped with both overseas authority and offices throughout America, could deny the IRCs both overseas telex calls and effective access to a share of the "next generation" of traffic. The overseas portion of such traffic, if available to the IRCs, would help to fill their cables and other facilities, spread the cost of maintaining them, and serve to sustain the remaining telex service. The Commission's analysis of competitive effects was, we submit, too casual and perfunctory to sustain a ruling of such significance to so many parties and to the public.

The Commission also declined to analyze the consequences of market fragmentation likely to result from the grants to Telenet and Graphnet. (See JA 38-39.) The Commission indicated its belief that the market could support direct service offerings by Graphnet and Telenet to Western Europe. (JA 38-39) But it did not assess the effect of such "support" on the ability of the IRCs to access the same and other points. Nor did it undertake an explanation of these issues in terms of its



long-standing policy against integration of domestic and foreign overseas services.

The IRCs serve the world, including many countries to which, inevitably, traffic volumes are very small.\* They can do so on economical terms only because substantial system costs are borne, not only by those transmissions, but also by the much larger volumes of traffic to a relatively few nations. If Graphnet and Telenet can "skim off" a good share of the "cream" represented by traffic to Britain, Germany, and a few other Western European centers, a necessary support for economical, efficient service to the rest of the world is impaired.

The Commission could conclude, of course, that the "benefits", such as they may be, of allowing Graphnet and Telenet to serve Western Europe directly, rather than through the inter-connection mode, outweigh the damage to other services. But the Agency cannot validly make that judgment until it faces the issue.

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\* To cite a few examples, the IRCs collectively transmitted, in 1976, 322 telegrams to Tobago, 302 to Greenland, and 351 to Equatorial Guinea, and 881 telex calls to New Caledonia, 771 to Upper Volta, and 605 to Somalia. See Federal Communications Commission, Statistics of Communications Common Carriers: Year Ended December 31, 1976 at 159-65 (1977).

**STATUTORY APPENDIX**



The point, in last analysis, is simple enough. The Commission's selective admission of Graphnet and Telenet will have systematic effects upon the entire overseas service. Tracing those effects is not easy, and, once traced, they pose difficult choices. But the demanding work, which has not been done, must be done if the "public convenience" of the applications in this suit are to be properly assessed. In its absence, the Commission's rulings should not be spared condemnation as arbitrary and capricious fiat.

#### CONCLUSION

RCA Globcom (and other IRCs) have supplied for decades to the American people an overseas record communications capability without peer in the world. From a few "gateways" they have effectively linked their own customers in those cities and the customers of interconnected domestic carriers with foreign networks around the globe.

The Commission's Decision to permit two domestic carriers selective entry into this industry on uniquely advantageous terms is arbitrary and capricious and an abuse of discretion. The Section 214 grants to Graphnet and Telenet threaten RCA Globcom (and the other IRCs) with competition on highly unequal terms while adding nothing to the actual communications





capability of the American people. The Court should vacate the grants and remand to the Commission for such further proceedings as may be appropriate.

Respectfully submitted,

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STATUTORY APPENDIX - TABLE OF CONTENTS

|                                                                         | PAGE |
|-------------------------------------------------------------------------|------|
| Communications Act of 1934, Section 201(a), 47 U.S.C.<br>§ 201(a) ..... | 1a   |
| Communications Act of 1934, Section 214, 47 U.S.C.<br>§ 214 .....       | 2a   |
| Communications Act of 1934, Section 222, 47 U.S.C.<br>§ 222 .....       | 5a   |
| Administrative Procedure Act, Section 10(e), 5 U.S.C.<br>§ 706 .....    | 10a  |



## STATUTORY APPENDIX

Communications Act of 1934,  
Section 201(a), 47 U.S.C. § 201(a)

## § 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

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**Communications Act of 1934,  
Section 214, 47 U.S.C. § 214**

**§ 214. Extension of lines; certificate of public convenience  
and necessity; discontinuance of service**

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels. *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commis-



sion finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States \$100 for each day during which such refusal or neglect continues.

Communications Act of 1934,  
Section 222, 47 U.S.C. § 222

§ 222. Consolidations and mergers of telegraph carriers.

(a) Definitions.

As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of designation within, the continental United States with respect to record communications by wire or radio which either originate



or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided*, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the District of Columbia and the States of the Union, except Hawaii.

(b) Consolidation or merger authorized; acquisition of facilities.

(1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided*, That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) Application to Commission; public hearings; determination of public interest; approval; divestment of international operations.

(1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If,



after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

(d) Alien ownership of capital stock.

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(e) Distribution of telegraph traffic among international carriers; contiguous foreign country defined; intervention of Commission; international and domestic operations construed.

(1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will



be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

(2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

(4) For the purposes of this subsection, the international telegraph operations of any domestic telegraph carrier shall be considered to be the operations of an independent international telegraph carrier, and the domestic telegraph operations of any international telegraph carrier shall be considered to be the operations of an independent domestic telegraph carrier.

(f) Protection of employees.



**Administrative Procedure Act,  
Section 10(e), 5 U.S.C. § 706**

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 77-4028  
78-4047

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ITT WORLD COMMUNICATIONS INC. and  
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents,

and

GRAPHNET SYSTEMS, INC., TELENET  
COMMUNICATIONS CORPORATION,  
WESTERN UNION INTERNATIONAL, INC.,  
and TRT TELECOMMUNICATIONS  
CORPORATION,

Intervenors.

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CERTIFICATE OF SERVICE

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The undersigned, of counsel to petitioner RCA Global Communications, Inc., certifies that the brief of petitioner RCA Global Communications, Inc. dated June 8, 1978 has been duly served this date by:



(a) Delivery of the appropriate numbers of copies of the brief by hand to the offices of:

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and

(b) Causing the appropriate numbers of copies to be mailed, by United States first class mail, postage prepaid, to each of the following:

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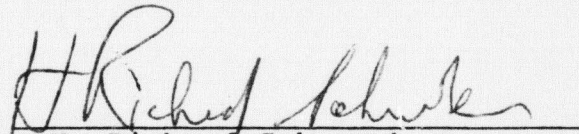
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Additionally, in accordance with the undertaking given by us in our motions for brief extensions of time to file this brief, copies of the brief have been dispatched by Air Courier to the Washington office of the undersigned's firm with the request that copies be delivered by hand to each of the above-named Washington counsel as soon as the papers arrive in Washington.

June 8, 1978

  
H. Richard Schumacher  
Counsel to RCA Global  
Communications, Inc.